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No. 91-808

In The
Supreme Court of the United States
October Term, 1991

RITAELLEN M. MURPHY, R.N., et al.,
Petitioners,
vs.
RICHARD M. RAGSDALE, M.D., et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF CERTAIN ILLINOIS STATE'S ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS-APPELLANTS

(each individual amicus is listed inside cover)

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The Honourable Charles H. Burch
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The Honourable Mary Jo Hunt
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The Honourable Raymond G. Kimbell III
Knox County

The Honourable Mark C. Hunter
Massac County

The Honourable Charles C. Roberts
Richland County

The Honourable Charles R. Hartman
Stephenson County

Note: This *amicus* brief is being filed with the consent of all of the parties. Consents are on file in the Office of the Clerk.

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INTEREST OF THE AMICI

The *amici* are Illinois state's attorneys for certain counties in the State of Illinois. They are members of the defendant class of state's attorneys, the representative of whom is a respondent on the petition for a writ of certiorari in this case. The *amici* themselves did not wish to see the settlement proposal at issue here entered into; and the representative did not engage in settlement negotiations until ordered to do so by the court.

The interest of the *amici* is the greater because in this case, which will have a dramatic impact on us in our official capacities, no one has yet pointed out that as a matter of state law, the dissenting women are not seeking enforcement, and that even the respondents themselves didn't think that *Diamond v. Charles*, the case which the Seventh Circuit based it judgment on, applies here.

Further, our interest is heightened because this case goes far beyond the simple matter of health regulation. Since there would be no issue of the dissenting women's standing in state courts in Illinois, this case will be the most important case for federalism since *Erie v. Tompkins*.

The brief does not overlap with the arguments of the petitioners. In the interests of the Court's time and that of the clerks we have kept this brief as short as possible.

SUMMARY OF ARGUMENTS

We find as a matter of Illinois law that the dissenting women are not seeking enforcement. Doing so would be unlawful. Under state and federal law a presumption operates in favor of any person to the effect that he is not acting unlawfully. There is nothing in the record to even suggest that the dissenting women are attempting to do the unlawful act of seeking enforcement, let alone rebut that presumption.

The respondent women effectively conceded that the dissenting women have standing and that *Diamond v. Charles* is inapplicable. Counsel for the respondent women are the leading attorneys in this nation on the doctrine of *Diamond.* They themselves successfully argued that principle in *Diamond*, and yet they never once briefed or argued in reliance on *Diamond* in the appellate or district courts to even suggest that the dissenting women might not have standing. This was no oversight on their part; they knew that *Diamond* simply does not apply.

Assuming, *arguendo*, that the dissenting women lack standing under the rules as they might exist now, denying standing for purposes of objecting to an unlawful act and raising questions of subject matter jurisdiction would be as serious a breach of federalism as *Swift v. Tyson* was, which this Court overruled in *Erie v. Tompkins.*

Illinois law provides that when a court is faced with two questions of subject matter jurisdiction---the authority of the court to accept an unconstitutional act,

and the standing of the objectors to raise such objections---the court will first look to see if the act which it is asked to accept is one which the court may in fact lawfully accept. In this instance the District Court unlawfully adopted a void statutory scheme.

Another question raised by the proceedings is whether a party may be ordered to participate in settlement negotiations. On this issue the Seventh and Eleventh Circuits are in conflict with the Second and Eighth Circuits. When the Seventh Circuit, *en banc*, in a 6 to 5 decision held that district courts may do so, it ran contrary to the only established authority on point at that time---that of the Second and Eighth Circuits. Now the Eleventh Circuit has followed the rule of the Seventh Circuit. We ask this Court to resolve this conflict and hold that a district court may not order a party to participate in settlement negotiations.

Since all parties must agree to a settlement proposal, the District Court ordered our class representative to participate in the settlement negotiations over his objections. Pursuant to that court order our representative helped craft an illegal settlement proposal which the district court lacked subject matter jurisdiction to approve.

This illegality cannot, in fact, be remedied by a later collateral attack; such attacks are as extremely disfavored in the federal jurisdiction as they are in the courts of Illinois. And the expense which this case has already entailed is enough to crush our budgets. The costs of a collateral attack would be prohibitive.

As law enforcement officials we are obliged to uphold Illinois law while simultaneously paying heed to this Court's decisions which do override Illinois law.

Illinois provides by statute that unborn children are persons, and that if *Roe v. Wade* is ever overruled or modified, unborn children are automatically entitled to be protected against abortion except where the mother's life is endangered. Because this Court's recent decisions have modified *Roe*, Illinois unborn children are now entitled to have their standing under Illinois statutory and constitutional law recognized. Judge Posner recognized this right of Illinois unborn children to intervene throughout the appellate level.

Unfortunately, the Seventh Circuit erroneously held that the efforts of the proposed intervenors were an attempt to enforce statutory enactments duly enacted by the Illinois General Assembly. Although these enactments are the subject matter of this case in its earlier form as it already exists on this Court's docket (88-790), the illegal and unconstitutional settlement proposal is the only subject matter of the present certiorari petition (91-808).

Since unborn children are now entitled to have their standing recognized, they can now object to a void settlement proposal. The question is whether the modification of *Roe* is such that the several states are still precluded from establishing personhood for these unborn children? Only this Court can answer that question. As the chief executive and enforcement officers for our counties, we must know the answer to that question to enable us to enforce the appropriate laws correctly.

ARGUMENTS

I. DIAMOND V. CHARLES IS INAPPLICABLE

A. THE PETITIONERS ARE NOT SEEKING ENFORCEMENT

We find as a matter of Illinois law that the petitioners are not seeking enforcement, which would be unlawful.[1]

The petitioners are entitled to a presumption that they are not seeking to do an unlawful act. This presumption obtains under Illinois law and in the federal jurisdiction as well.[2]

There is nothing in the record to even suggest that the petitioners are seeking enforcement. Absent

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1. Enforcement is reserved for the Executive branch of Illinois state government. Illinois Constitution of 1970, Article V, Section 15 and Article II, Section 1. Illinois does follow the common law rule, though, that a private citizen may obtain injunctive relief against a public nuisance if the harm he suffers is different in kind from that of the public in general. *Joseph v. Wieland Dairy Co.*, 131 N.E. 94, 297 Ill. 574 (1921).

2. *Robinson v. Workman*, 137 N.E.2d 804, 808, 9 Ill.2d 420, 427 (1956); *TRW, Inc. TRW Michigan Division v. N.L.R.B.*, 393 F.2d 771 (6th Cir. 1968); *N.L.R.B. v. Shawnee Industries, Inc.*, 333 F.2d 221 (10th Cir 1964); *In re Las Colinas, Inc.*, 294 F.Supp. 582 (D. P.R. 1968).

evidence, the presumption that they are not seeking enforcement is not rebutted. We ask this Court to take notice of the fact that the Seventh Circuit does not make any reference to the record in stating the conclusion that the petitioners are seeking enforcement. But how could the court make such a reference? For there is nothing in the record to support such a conclusion.

The wind will not rebut a presumption. Something more solid than a mere statement to that effect is needed before a person may be deprived of a presumption to which he is entitled under the law.[3] A substantive basis must be presented to deprive one of a presumption; the record provides no such foundation.

B. THE DISSENTING WOMEN ARE TRYING TO DEFEND THEIR OWN INTERESTS

The dissenting women are trying to do what anyone in a federal or state class action may do: Defend their own interests.[4]

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3. *International Union (UAW) v. N.L.R.B.*, 459 F.2d 1329 (DC Cir. 1972); *Brown v. Brown*, 160 N.E. 149, 329 Ill. 198 (1928); 29 Am.Jur.2d Evidence Sections 122, 124-126, 130-131; ALR Digests Evidence, Sections 93 and 122.

4. *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991) (representative and counsel may be tempted to sell out class for their own benefit); *Roby v. St. Louis Southwestern Ry. Co.*, 775 F.2d 959 (8th Cir. 1985); *Griffin v. Carlin*, 755 F.2d 1516 (11 Cir. 1985); *National Ass'n of Regional Medical Programs v. Mathews*, 551 F.2d 340 (DC Cir 1976) *cert den.* 431 U.S. 954; *Miner v. Gillette Co.*, 428 N.E.2d 478, 87 Ill.2d 7 (1981), *cert. granted* 102 S.Ct. 1767, *cert. dismissed* 103 S.Ct. 484; *Fiorito v. Jones*, 384 N.E.2d 316, 74 Ill.2d 226 (1978).

The respondent women did not have to include the interests of the dissenting women if they didn't want to. But joining all women under the federal class action statute made their work easier for them by eliminating the need to proceed one plaintiff at a time against each defendant state's attorney.

Having chosen of their own volition to carve out a plaintiffs' class broad enough to include the interests of the dissenting women, the respondent women are now in no position to complain when the dissenters try to defend those very interests. Having taken advantage of the federal class action statute which brings them to federal court in the first place, litigants in the position of the respondent women must learn to take the bitter with the sweet.[5]

C. THE RESPONDENTS EFFECTIVELY CONCEDED THAT DIAMOND IS INAPPLICABLE

We agree that federal courts have an independent duty to search the record for defects in subject matter jurisdiction. But we think it worth noting that counsel for the respondent women are the leading attorneys in the nation of the doctrine of *Diamond v. Charles*[6], that they themselves successfully argued that doctrine in *Diamond* itself, and yet they never once

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5. *See, Arnett v. Kennedy*, 416 U.S. 134, 153-154, 94 S.Ct. 1633, 1644, 40 L.Ed.2d 15, 33 (1974) (Plurality Opinion of Rehnquist, J.).

6. *Diamond v. Charles*, 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986).

raised that issue in the district court or in the Seventh Circuit to even suggest that the dissenting women did not have standing.

Never once was *Diamond* even mentioned in any way by anyone or by the district or appellate court, in any written document or oral presentation in either of those courts, until the Seventh Circuit issued its opinion.

This was no oversight on the respondents' part; they had not forgotten about *Diamond*. They simply knew it didn't apply; and so they never briefed or argued in reliance on it.

II. THE OPINION OF THE SEVENTH CIRCUIT STANDS DIAMOND ON ITS HEAD

The basic principle of *Diamond* is that those who lack the authority to perform a function of state government lack standing in federal courts to take upon themselves the mantle of state authority and use the federal courts to eviscerate an office of state government and the provisions of state law[7]. But that is precisely what will happen if the judgment of the Seventh Circuit is allowed to stand.

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7. *Diamond*, 476 U.S. at 64-65, 106 S.Ct at 1704-1705, 90 L.Ed.2d at 59.

A. CONSIDERATIONS OF COMITY AND FEDERALISM REQUIRE THE FEDERAL COURTS TO RECOGNIZE THE STANDING OF THE PETITIONERS

Assuming, *arguendo*, that the petitioners do not have standing under the doctrines pertaining to such as they exist now on their face, it would still violate basic principles of federalism to deny standing here.

On the subject of standing the Supreme Court of Illinois has stated the well-established Illinois rule that "a court will consider the validity of a statute only at the instance of the parties directly affected by its invalidity." However, in the next sentence the Supreme Court also noted the important caveat to the Illinois rule which provides that "if the unconstitutional feature is of such a character as to render the entire act void this court will entertain objections to its validity."[8] (citations omitted). Thus, in Illinois courts all of the Petitioners could object to the adoption of a judicially created, void statutory scheme.

We respectfully submit that a federal rule of standing which allows the respondents to use the federal courts to defeat the standing which citizens of a state would enjoy in their own state court is as serious

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8. *Huckaba v. Cox*, 150 N.E.2d 832, 843, 14 Ill.2d 126, 129 (1958); *see also, People v. Palkes*, 288 N.E.2d 469, 52 Ill.2d 472 (1972), *appeal dismissed* 411 U.S. 923; *People v. Vandiver*, 283 N.E.2d 681, 51 Ill.2d 525 (1971); *Edelen v. Hogsett*, 254 N.E.2d 435, 44 Ill.2d 215 (1969).

a breach of federalism as *Swift v. Tyson*[9] was, which this Court overruled in *Erie v. Tompkins*[10]. And a federal rule which allows certain private citizens and state officers to take on an unwarranted, unconstitutional mantle of state authority and then use this mantle and the federal courts to evade the state law rule of standing which would allow the petitioners to prevail is a rule which runs squarely contrary to *Diamond* itself.

Indeed, this Court expressly recognized in *Diamond* that state law may create rights, the invasion of which may confer standing in federal courts.[11]

This Court has recognized that principles of comity and federalism require the federal courts to tailor their doctrines to respect state sovereignty[12]. We ask this Court to find that *Diamond* has been misapplied by the Seventh Circuit, and to tailor this Court's doctrine in *Diamond* to better effectuate the very purposes for which the *Diamond* doctrine exists.

We ask this Court to recognize once again that federalism has substantive as well as procedural dimensions.

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9. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842).

10. *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

11. *Diamond*, 476 U.S. at 65 n. 17, 106 S.Ct. at 1705 n. 17, 90 L.Ed.2d at 60, n. 17.

12. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104 n. 13, 104 S.Ct. 900, 910 n. 13, 79 L.Ed.2d 67, 81, n. 13.

B. THE ILLINOIS RULE IS CONSISTENT WITH FEDERAL RULES OF STANDING

The Seventh Circuit found itself faced with two questions of subject matter jurisdiction---the authority of the court to accept an unconstitutional act, and the standing of the Petitioners to raise such objections. The Seventh Circuit made no express finding as to the order they should be addressed, but the court determined *sub silencio* that standing should be addressed first.

This sets federal rules pertaining to subject matter jurisdiction at odds with themselves. It is uniformly held throughout the federal jurisdiction not only that all questions of subject matter jurisdiction may be raised at any time by the parties, but that the courts even have a duty to do so *sua sponte*, to examine not only their own jurisdiction, but also that of the courts below.[13] In this case the Seventh Circuit chose to address standing first. Even if the Seventh Circuit's conclusion on standing had been correct, it still would have reached the opposite result if it had addressed the void character of the settlement proposal first. Only this Court can provide the clarification needed on this procedural aspect of subject matter jurisdiction.

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13. *Bender v. Williamsport Area School Dist.* 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986), *reh. den.* 476 U.S. 1132; *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988); *U.S. v. State of Alabama*, 791 F.2d 1450 (11th Cir. 1986), *reh. den.* 796 F.2d 1478, *cert. den. Board of Trustees of Alabama State University v. Alabama State Board of Education*, 479 U.S. 1085; *In re Rini*, 782 F.2d

Under the rule effectively embraced by the Seventh Circuit, a federal judge may dismiss a case for lack of subject matter jurisdiction by reason of some point which occurs to him on his own, or which he reads in an article, or which is written on a note that is slipped under his door--but not if the point is brought to his attention by someone who is at least a *prima facie* party to the case.

This allows federal courts to undertake a wholly unlawful enterprise, nowhere authorized by Article III of the U.S. Constitution or by federal statute, and get away with it if such illegality is made known by someone who has made a good-faith attempt to appear before the court, but not if the illegality is made known by a passing remark from a stranger on the street.

As a matter of logic, it makes far more sense for federal courts to first determine whether it is lawful for them to do the thing which they are asked to do. For otherwise an utterly unlawful, unauthorized act by the federal courts will not only be perpetrated by them but will even be defended by them by a rule of standing which is precisely designed to prevent the court from doing unlawful, unauthorized acts.

The Illinois standing rule obviates this dilemma,

(note 13, cont'd)
603 (6th Cir. 1986); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295 (5th Cir. 1985); *Kanzelberger v. Kanzelberger*, 782 F.2d 774 (7th Cir. 1986); *Minnesota Chippewa Tribe Red Lake Band v. U.S.*, 768 F.2d 338 (Fed. Cir. 1985).

and prevents an unlawfully crafted and unlawfully accepted settlement proposal from becoming *res judicata*.

C. THE USE OF THE ILLINOIS RULE CAN BE NARROWLY TAILORED TO THE NEEDS OF THIS CASE

There is no need for this Court to accept the Illinois rule as a general principle for federal courts if it deems it prudent to tailor its doctrines of standing to the precise needs of the case. The precedent which this Court may set may simply be that in cases in which a state's law would allow persons standing to object on the basis of illegality or a lack of subject matter jurisdiction, it would be an invasion of federalism for federal courts to deny standing for that limited purpose. Indeed, the precedent set could be narrower.

Nor do we ask this Court for a rule which would allow persons to have standing in federal court anytime they would have standing in state court, for this would then allow standing in federal court in states which allow their own courts to render advisory opinions; such a rule would be far more broad than anything we seek here.

The Illinois rule, we should note, does not apply to cases in which the result which may be achieved may be simply erroneous, or in which the exercise of jurisdiction may be questionable or flawed. By its own terms the Illinois rule applies only to those cases in which the action objected to "...is of such a character as to render

the entire act void...".[14]

We merely submit that in cases in which the validity of a state law is in question, where a state law rule of standing which does not operate contrary to the subject matter jurisdictional requirements of federal courts would allow a citizen of a state to object to an act of the court which is unlawful or outside of the court's subject matter jurisdiction, then the federal courts, as a matter of comity and federalism, should not deny citizens of a state the limited standing which they would have in state court to raise such objections. This is particularly the case when the objection is raised by someone who is at least *prima facie* a party to the case.

III. THERE IS A SPLIT OF AUTHORITY IN THE CIRCUIT COURTS OF APPEALS AS TO WHETHER A PARTY MAY BE ORDERED TO PARTICIPATE IN SETTLEMENT NEGOTIATIONS

Our defendant class representative participated in the settlement negotiations only after being ordered to do so by the District Court. (A-45) In 1989 the Seventh Circuit, en banc, in 6 to 5 decision held that a district court may enter such an order. The Seventh Circuit was faced with the question of whether such an order constitutes an inherent power of the court designed to give effect to the Federal Rules of Civil Procedure or

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14. *Huckaba, supra,* 150 N.E.2d at 843, 14 Ill.2d at 129.

whether it constitutes an unwarranted expansion of the court's power beyond the Federal Rules.[15]

Five dissents were filed in that opinion. We wish to direct this Court's attention particularly to the dissent of Judge Ripple, joined by Judge Coffey, in which Judge Ripple stated:

> "...the most enduring---and dangerous---impact of the majority's opinion will not be its effect on the conduct of the pretrial conference, but on the relationship between the Judiciary and the Congress in establishing practice and procedure for the federal courts."[16]

Prior to the Seventh Circuit's decision the Second and Eighth Circuits had already provided the only precedent on point. The Second Circuit flatly stated that Rule 16 "...was not designed as a means for clubbing the parties---or one of them---into an involuntary compromise."[17] The Eighth Circuit has said that the district court should avoid the appearance as well as the reality of coercing a settlement.[18]

Now the Eleventh Circuit has joined the Seventh

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15. *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc).

16. *G. Heileman Brewing Co., Inc.*, 871 F.2d at 665 (Ripple, J., dissenting).

17. *Kothe v. Smith*, 771 F.2d 667 (2nd Cir. 1985).

18. *In re Ashcroft*, 888 F.2d 546, *reh. den.* (8th Cir. 1989).

Circuit in holding that district courts may coerce a party to participate in settlement negotiations, despite the fact that in doing so the court expressly acknowledged that under the advisory notes on Rule 16, the purpose of the Rule is not "...to impose settlement negotiations on unwilling litigants."[19]

Such a construction of the Federal Rules is particularly egregious when a party is ordered to participate in crafting an unlawful settlement proposal which the district court lacks subject matter jurisdiction to approve.

IV. THE RELIEF OF A LATER COLLATERAL ATTACK ON THIS UNLAWFUL SETTLEMENT PROPOSAL DOES NOT EXIST AS A PRACTICAL MATTER

The illegal settlement cannot be collaterally attacked, as Judge Posner suggests. Such attacks are as extremely disfavored in the federal system as they are in the courts of Illinois.[20] The hundreds of thousands of dollars in legal expense which this case has already cost is enough to crush our county budgets; we cannot in good conscience subject our counties to a such cost in the future. With such prohibitive costs and possible contempt sanctions, collateral relief is no relief at all.

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19. *In re Novak*, 932 F.2d 1397, 1405, n. 15 (11th Cir. 1991).

20. *Henderson v. Kibbe*, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940), *reh. den.* 309 U.S. 695; *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 53 S.Ct. 721, 77 L.Ed. 1331 (1933); *Old Wayne Mut. Life Ass'n v. McDonough*,

V. IT IS IMPERATIVE THAT THE LAW OF ABORTION BE CLARIFIED IMMEDIATELY

As law enforcement officials we are obliged to uphold Illinois law while simultaneously paying heed to this Court's decisions which do, on occasion, override Illinois law.

Illinois provides by statute that unborn children are persons, and that if *Roe v. Wade* is ever overruled or modified, unborn children are automatically entitled to be protected against abortion except where the mother's life is endangered.[21] Because this Court's recent decisions have modified *Roe*, Illinois unborn children are now entitled to have their standing under Illinois statutory and constitutional law recognized. Judge Posner recognized this right of Illinois unborn children to intervene throughout the appellate level.

(note 20, cont'd)
204 U.S. 8, 27 S.Ct. 236, 51 L.Ed. 345 (1907); *City of New Orleans v. Fisher*, 180 U.S. 185, 21 S.Ct. 347, 45 L.Ed. 485 (1901); *Evers v. Watson*, 156 U.S. 527, 15 S.Ct. 430, 39 L.Ed. 520 (1895); *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U.S. 656, 23 L.Ed. 336 (1875); *McNitt v. Turner*, 83 U.S. (16 Wall.) 352, 21 L.Ed. 341 (1872); *Gray v. Brignardello*, 68 U.S. (1 Wall.) 627, 17 L.Ed. 693 (1863); *Sargeant v. State Bank of Indiana*, 53 U.S. (12 How.) 371, 13 L.Ed. 1028 (1851); *Kennedy v. Bank of State of Georgia*, 49 U.S. (8 How.) 586, 12 L.Ed. 1209 (1850); *Matter of Chicago, Milwaukee, St. Paul and Pacific R. Co.* 738 F.2d 209 (7th Cir. 1984); *Kenner v. C.I.R.*, 387 F.2d 689 (7th Cir. 1968), *cert. den.* 393 U.S. 841, *reh. den.* 393 U.S. 971; *Hardy v. Bankers Life & Cas. Co.*, 232 F.2d 205 (7th Cir. 1956), *cert. den.* 351 U.S. 984; *Baker v. Brown*, 23 N.E.2d 710, 372 Ill. 336 (1939).

21. Illinois Abortion Act of 1975, Ill.Rev.Stat., Ch. 38, Sec 81-21.

Unfortunately, the Seventh Circuit erroneously held that the efforts of the proposed intervenors were an attempt to enforce statutory enactments duly enacted by the Illinois General Assembly. Although these enactments are the subject matter of this case in its earlier form as it already exists on this Court's docket (88-790), the illegal and unconstitutional settlement proposal is the only subject matter of the present certiorari petition (91-808).

Since unborn children are now entitled to have their standing recognized, they can now object to a void settlement proposal. The question is whether the modification of *Roe* is such that the several states are still precluded from establishing personhood for these unborn children? Only this Court can answer that question. As the chief executive and enforcement officers for our counties, we must know the answer to that question to enable us to enforce the appropriate laws correctly.

CONCLUSION

We ask the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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